No. 94-2037

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

JEFFREY B. POMRANZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is procedurally barred from collaterally attacking his firearms conviction on the ground of improper venue under 28 U.S.C. 2255, where petitioner failed to raise the alleged venue defect before trial, at trial, or on direct appeal.

2. Whether, in a prosecution under 18 U.S.C. 924(c), for using or carrying a firearm "during and in relation to a drug trafficking crime," venue may be laid in the district where the predicate drug trafficking conspiracy was conceived, planned, and largely executed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 43 F.3d 156. The opinion of the district court (Pet. App. B1-B12) is unreported. An earlier opinion by the court of appeals, affirming petitioner's conviction on direct appeal (Pet. App. E1-E18), is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1995. A petition for rehearing was denied on March 13, 1995. The petition for a writ of certiorari was filed on June 12, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of conspiracy to distribute marijuana, in violation of 21 U.S.C. 846; four counts of unlawful use of a communication facility, in violation of 21 U.S.C. 843(b); six counts of interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952; possession of a controlled substance with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c). Petitioner was sentenced to concurrent terms of 216 months' imprisonment on each of the narcotics and racketeering counts, and to a consecutive term of 60 months' imprisonment for the Section 924(c) violation. The court of appeals affirmed. Pet. App. E1-E18. Petitioner thereafter sought vacatur of his firearms conviction under 28 U.S.C. 2255, contending that venue for that charge did not lie in the Northern District of Texas. The district court denied petitioner's motion, Pet. App. B1-B12, and the court of appeals affirmed. *Id.* at A1-A16.

1. In August 1988, a government informant arranged a meeting in Dallas between petitioner and Mike DeLaFlor, an undercover DEA agent in Fort Worth. During that meeting, petitioner stated that he was having difficulty importing marijuana from Mexico into the United States, despite having paid $80,000 in bribes to Mexican officials. The two men met several more times in October and November 1988, when they agreed that petitioner would pay DeLaFlor $1.6 million for an initial purchase of 4,000 pounds of marijuana, to be delivered in two shipments

of 2,000 pounds each. For each shipment, petitioner would pay an advance of $100,000, an additional $100,000 when the drugs were delivered to the Dallas area, and the balance when the drugs were delivered to him. Petitioner indicated that, if those transactions were successful, he would consider buying several tons of marijuana from DeLaFlor each week. Pet. App. E2-E3, A3.

On November 12, one of the men working for petitioner met DeLaFlor in a restaurant in Arlington, Texas, and made the first payment. On November 17, petitioner personally paid the second installment of $100,000, after having the marijuana shipment inspected in Dallas by one of his men. That evening, DeLaFlor flew to Oklahoma City, Oklahoma, where he was to obtain the final payment from petitioner after petitioner received confirmation that the marijuana had been delivered to his associates in Dallas. Pet. App. E3-E4, A3.

On November 18, petitioner arrived at DeLaFlor's motel room in Oklahoma City, carrying a box containing more than $400,000, as well as an automatic weapon that was secreted in his jacket. Petitioner and DeLaFlor waited for verification that the marijuana had been transferred to petitioner's associates in Dallas. In Dallas, undercover agents and men working for petitioner loaded approximately one ton of marijuana into a camper that petitioner had had specially outfitted for transporting illegal drugs. Petitioner and his co-conspirators were then arrested in Oklahoma and Dallas, respectively. Pet. App. E5.

Petitioner was thereafter indicted in the Northern District of Texas on narcotics and racketeering charges, and for using or carrying a firearm during and in relation to a drug trafficking crime, in vio-

lation of 18 U.S.C. 924(c). The Section 924(c) count referred to the automatic weapon seized from petitioner at the time of his arrest in Oklahoma City. He was found guilty of those offenses after a jury trial. The convictions were affirmed on petitioner's direct appeal. Petitioner did not contest venue on the Section 924(c) count before trial, during trial, or on direct appeal. See Pet. 4.

2. After the convictions were affirmed on direct appeal, petitioner sought collateral relief under 28 U.S.C. 2255. He challenged his Section 924(c) conviction on the ground that venue for that offense did not properly lie in the Northern District of Texas. The district court denied the motion. The court noted that the "basis upon which [petitioner] argu[ed] a defect of venue"—*i.e.*, the indictment's allegation that petitioner used and carried a firearm "in Oklahoma City, Oklahoma"—was "clear and unambiguous on the face of the indictment," and that there was "nothing in the record of the criminal proceedings, either before, during, or after trial, that indicates that [petitioner] had any concern regarding the fairness of his being tried in Texas on the firearms charge." Pet. App. B7-B8. Accordingly, the court concluded that "even if [petitioner's] venue claim had merit, * * * [petitioner] waived his objection thereto by failing to raise this issue until over one year after his conviction." *Id.* at B8.

The court also concluded that in any case petitioner's venue argument is meritless. The court noted that where "the statute [defining the charged offense] does not indicate where Congress considered the place of committing the crime to be, . . . the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts

constituting it." Pet. App. B5 (quoting *United States* v. *Anderson*, 328 U.S. 699, 703 (1946)). Because a conviction under 18 U.S.C. 924(c) requires, as one of its elements, proof that the defendant committed a narcotics felony, Pet. App. B5-B6, and because petitioner was the leader of a very sophisticated narcotics smuggling conspiracy that engaged in overt acts in both the Northern District of Texas and the Western District of Oklahoma, *id.* at B4-B5, the court concluded that "[n]ecessary elements of the [Section 924(c)] offense were committed both in the Northern District of Texas and in Oklahoma." *Id.* at B6. In view of that fact, the court ruled that the Section 924(c) offense was a continuing offense that began in the Northern District of Texas, and that venue therefore was properly laid there under 18 U.S.C. 3237, which provides that venue for continuing offenses is proper in "any district in which such offense was begun, continued, or completed." Pet. App. B5, B6.[1]

3. The court of appeals affirmed the denial of collateral relief. Like the district court, the court of appeals noted that a conviction under 18 U.S.C. 924(c) requires that the government prove both that the defendant used or carried a firearm, and that he did so during and in relation to a crime of violence or drug trafficking crime that he also committed. Pet. App. A15. Because "the indispensable predicate offense is

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[1] The district court also rejected petitioner's contention that his failure to challenge venue at trial was due to constitutionally ineffective assistance of counsel. The court found that petitioner had not met his burden on either prong of the two-part test for claims of ineffective assistance of counsel that this Court set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984). Pet. App. B9.

as important or essential to the completed offense as the carrying or using of the firearm and since the use or carrying of the firearm itself must be made during and in relation to such predicate offense, it follows that venue should be allowed where the violent crime or drug offense occurred." Pet. App. A15.

That ruling was also consistent with the goals of Section 924(c), the court concluded, since Congress could not have intended "the immensely undesirable result" of requiring the government, in a case like this one, to prove the existence of the underlying narcotics conspiracy twice—once in Texas, and again in Oklahoma. By forcing the government to choose between this signifcant duplication of efforts and expenditure of resources and forgoing prosecution under 18 U.S.C. 924(c), such a holding "would effectively undermine the Congressional intent to curb the violence inherently associated with high level drug deals." Pet. App. A12.

ARGUMENT

Petitioner contends that the decision below conflicts with *United States* v. *Corona*, 34 F.3d 876 (9th Cir. 1994), which reversed, on direct appeal, a conviction under 18 U.S.C. 924(c) on the ground of improper venue. That conflict is not properly presented in this case, however, because petitioner is procedurally barred from raising the merits of his venue claim under 28 U.S.C. 2255. In any event, the court of appeals correctly concluded that venue was properly laid in the Northern District of Texas under the facts of this case. Further review is not warranted.

1. This Court has repeatedly emphasized that "'[n]o procedural principle is more familiar to this

Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before the tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 113 S. Ct. 1770, 1776 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). See also *Peretz* v. *United States*, 501 U.S. 923, 936-937 (1991). Petitioner was required to object in advance of trial to any venue defect that was clear from the face of the indictment, as he contends the defect here was, see Fed. R. Crim. P. 12(b)(1), or at least to request that the jury be instructed on the issue of venue before it retired to deliberate, see Fed. R. Crim. P. 30; see also *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 402-404 (1927). Petitioner took neither step. In those circumstances, no court of appeals would grant petitioner relief, even on direct appeal, on the basis of the venue defect that he alleges.[2] A defendant cannot ordinarily wait to see what verdict the jury renders before he decides whether to raise such a claim. Indeed, petitioner committed a further procedural default when, after twice forfeiting his claim at trial, he also failed to raise the issue of venue on direct appeal.

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[2] See, *e.g.*, *United States* v. *Khan*, 821 F.2d 90, 93 (2d Cir. 1987) ("[Defendant's] failure to object prior to trial constituted a waiver of the lack of venue."); *Kitchen* v. *United States*, 532 F.2d 445, 446 (5th Cir. 1976) ("Defects relating to venue are waived unless asserted prior to trial."); *United States* v. *Powell*, 498 F.2d 890, 891-892 (9th Cir.) (finding waiver where defendant failed to raise issue of venue until after conviction), cert. denied, 419 U.S. 866 (1974); see also *United States* v. *Brandon*, 50 F.3d 464, 469 (7th Cir. 1995); *United States* v. *Turley*, 891 F.2d 57, 61 (3d Cir. 1989).

Because petitioner is seeking to raise his objections to venue in a petition pursuant to 28 U.S.C. 2255, after trial and appellate defaults, he faces a "significantly higher hurdle" than he would face if he were raising his claim on direct review. *United States* v. *Frady*, 456 U.S. 152, 166 (1982). This Court has "long and consistently affirmed that a collateral challenge may not do service for an appeal." *Id.* at 165; see also *Davis* v. *United States*, 411 U.S. 233, 241-242 (1973). Before a court may reach the merits of a procedurally defaulted claim, the petitioner must demonstrate both "cause" for each failure to raise the issue in accordance with the applicable procedural rules, and "actual prejudice" resulting from the error he alleges. See *Sawyer* v. *Whitley*, 505 U.S. 333, 338, (1992); *Murray* v. *Carrier*, 477 U.S. 478, 489-491 (1986); *Smith* v. *Murray*, 477 U.S. 527, 533 (1986); *Engle* v. *Isaac*, 456 U.S. 107, 129 (1982). That stringent standard requires petitioner to show not only that "some objective factor external to the defense" impeded his efforts to raise the issue as required by each relevant procedural rule, see *Coleman* v. *Thompson*, 501 U.S. 722, 753 (1991) (quoting *Murray* v. *Carrier*, 477 U.S. at 488), but also that the constitutional error he alleges "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States* v. *Frady*, 456 U.S. at 170.

Petitioner has not attempted to meet that heavy burden. He alleges only that this Court has long viewed venue defects as "cognizable" in habeas corpus proceedings. Pet. 9. That, however, shows only that the error that petitioner alleges is of the *type* that may properly be raised in a habeas corpus pro-

ceeding.[3] In that respect, petitioner's venue claim is no different from other constitutional claims that are sufficiently fundamental to be cognizable by a habeas court. But as with other allegations of constitutional error, see, *e.g.*, *United States* v. *Frady*, 456 U.S. at 169-170 (burden-shifting instruction); *Davis* v. *United States*, 411 U.S. at 235 (unconstitutional discrimination in the selection of the grand jury), petitioner may not secure review of his venue claim unless he demonstrates cause for each of his procedural defaults and actual, rather than speculative, prejudice therefrom. His failure to make those showings is fatal to his venue claim.

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[3] Petitioner suggested below that his lawyer's failure to raise the purported venue defect amounted to ineffective assistance of counsel that should excuse his procedural defaults. Petitioner has not renewed that claim of ineffectiveness in this Court. In any event, that claim was meritless. Not only must the constitutional adequacy of counsel be gauged in the context of the assistance given in the trial as a whole, see *Kimmelman* v. *Morrison*, 477 U.S. 365, 382 (1986), but "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984), quoting *Michel* v. *Louisiana*, 350 U.S. 91, 101 (1955). Here, even if it were clear that venue for the firearms offense was lacking, counsel might reasonably have concluded that petitioner stood a better chance of acquittal at a single trial for all the offenses, and that it would be unwise to expose petitioner to the risk of successive prosecutions in different districts. Moreover, petitioner could not show that counsel's alleged shortcomings were "so serious as to deprive [him] of a fair trial, a trial whose result is reliable," *Strickland* v. *Washington*, 466 U.S. at 687, since the purported venue defect does not bear on the reliability of the jury's verdict.

2. In any event, venue was properly laid in the Northern District of Texas in this case. The Constitution guarantees a criminal defendant the right to be tried in the State and district in which the crime "shall have been committed." U.S. Const. Art III, § 2; Amend. VI. Thus, the central task in disposing of a claim of improper venue is the "determination of where the crime was committed." *United States* v. *Cores*, 356 U.S. 405, 407 (1958); see also *Armour Packing Co.* v. *United States*, 209 U.S. 56, 76 (1908) ("The constitutional requirement is as to the locality of the offense, and not the personal presence of the offender."). Where Congress has not expressly identified the place where the offense must be deemed to have been committed, "the Court must base its determination on 'the nature of the crime alleged and the location of the acts or acts constituting it.'" *United States* v. *Cores*, 356 U.S. at 408 (quoting *United States* v. *Anderson*, 328 U.S. 699, 703 (1946)). And "where a crime consists of distinct parts which may have different localities," it is "undoubtedly" the case that "the whole may be tried where any part can be proved to have been done." *United States* v. *Lombardo*, 241 U.S. 73, 77 (1916); see also *Travis* v. *United States*, 364 U.S. 631, 636 (1961) ("Multiple venue in general requires crimes consisting of 'distinct parts' or involving 'a continuously moving act.'").

The court of appeals correctly applied those principles in this case. Section 924(c) makes it a crime to "use or carry" a firearm only "during and in relation to" the commission of a drug trafficking offense or a violent crime. It is well settled that "[t]he mere carrying or use of a firearm is not the criminal *actus reus* proscribed," and "[t]he contingent nature of the

offense * * * demonstrates that the focal point—or 'essence'—of the offense [is] that a criminal defendant used a firearm in committing another federal crime." *United States* v. *Correa-Ventura*, 6 F.3d 1070, 1083 (5th Cir. 1993). Because the firearm's use is "inextricably intertwined with the underlying offense," *id.* at 1084, Section 924(c) defines an offense that has "distinct parts," and which may therefore be prosecuted in any district "where any part can be proved to have been done." *United States* v. *Lombardo*, 241 U.S. at 77.

There is no merit to petitioner's contention (Pet. 17-18) that the court of appeals' ruling conflicts with *United States* v. *Midstate Horticulture Co.*, 306 U.S. 161 (1939). That case involved prosecutions brought under the Elkins Act, which made it a crime to pay a rebate or concession, so as to reduce the applicable tariff, "in respect to the transportation of any property in . . . interstate commerce." *Id.* at 164. *Midstate Horticulture Co.* upheld dismissal of the indictments, holding that no venue existed in the Eastern District of Pennsylvania, where part of the transportation had occurred, when a rebate had been paid in New York. The sole reason for that result, however, was that the illegal rebate was not contemplated when the transportation occurred; it was paid three years later. The Court was unwilling to "believe that Congress intended that subsequent conduct or events should stamp criminality upon an act that was lawful, and wholly unrelated to any unlawful plan or purpose, when done." *Id.* at 166. That holding has no application here, because petitioner cannot possibly contend that his conduct in joining the narcotics conspiracy was lawful. More instructive is *Armour Packing Co.* v. *United States*,

supra, decided under the same Act, and distinguished and reaffirmed by *Midstate Horticulture Co.*, 306 U.S. at 165, where the Court made clear that when transportation is an essential part of the offense (*e.g.*, when an illegal rebate is paid in advance), "the transportation being of the essence of the offense, when it takes place, whether in one district or another, * * * [the offense] is equally and at all times committed." 209 U.S. at 74.[4]

Finally, petitioner contends that review is warranted because the court of appeals recognized that its conclusion is inconsistent with the result reached by the Ninth Circuit in *United States* v. *Corona*, 34 F.3d 877 (1994). Quite apart from the fact that *Corona* arose on direct, not collateral, review, that factor does not militate in favor of review in this case. *Corona*

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[4] Petitioner also faults the court of appeals (Pet. 9-10) for its recognition (Pet. App. A12-A13) that petitioner's venue theory would, as a practical matter, nullify Congress's intent that armed narcotics traffickers be severely punished under Section 924(c). According to petitioner, those "policy considerations" are "alarming" and inconsistent with "the required constitutional analysis." Pet. 9-10. The court of appeals' analysis, however, is entirely consistent with this Court's recognition that Congress enjoys some discretion in fixing the proper venue for offenses it has created. See, *e.g.*, *United States* v. *Anderson*, 328 U.S. 699, 703 (1946) (examining nature of the crime alleged "since the statute does not indicate where Congress considered the place of committing the crime to be"). Indeed, the analysis to which petitioner objects finds ready parallels in this Court's venue decisions. See, *e.g.*, *United States* v. *Cores*, 356 U.S. 405, 409-410 (1958) ("It is hardly likely that the Congress would create the new sanction only to strip it of much of its effectiveness by compelling trial in the district where the crewman was present when his permit expired—a place which months or years later might well be impossible of proof.").

devoted the bulk of its analysis to the different question whether venue was proper in the District of Nevada for substantive counts of narcotics distribution that occurred in California. 34 F.3d at 879-880; see also Pet. App. A13-A14 & n.8 (suggesting that the court below would agree with *Corona*'s holding with respect to the substantive drug convictions). *Corona* simply rejected the contention that venue is proper "over a substantive crime committed in furtherance of a conspiracy in any district where venue is proper for the conspiracy charge." 34 F.3d at 879. On that basis, the court found venue improper in Nevada for the drug distribution charges, as well as for a Section 924(c) charge that involved the use of a gun in California. The Ninth Circuit did not separately analyze the language of Section 924(c), and it did not consider the argument that the Fifth Circuit found crucial in this case—*i.e.*, that Congress created a compound offense by requiring that the firearm be used or carried "during and in relation" to a drug trafficking crime. Pet. App. A8-A9.[5] When that contention is squarely presented, the Ninth Circuit may well conclude that venue is proper in a Section 924(c) prosecution where the drug crime occurred or

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[5] Petitioner also appears to suggest that the decision below is inconsistent with *United States* v. *Scaife*, 749 F.2d 338 (6th Cir. 1984). That is wrong. *Scaife* affirmed a conviction under Section 924(c) on the basis of evidence that the firearm was used or carried in the district where the prosecution was brought, but the court did not suggest that the venue for that offense could not properly have been laid in any other district. 749 F.2d at 346. That holding is consistent with the Fifth Circuit's recognition that Section 924(c) creates a compound offense. Nothing in the decision below would *preclude* a prosecution in the district where the firearm was used or carried.

where the firearm was used during and in relation to that drug crime. Because this is not an issue that has generated significant appellate litigation to date, the possibility that any conflict will abate without this Court's intervention counsels strongly against further review in this case (which, because of its procedural posture, does not squarely present the alleged conflict).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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